Supreme Court, U.S.
FILED

159

No. (1) 091282

APR 8 - 2010

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In The

Supreme Court of the United States

US TECHNOLOGY CORPORATION,

Petitioner,

v.

STEPHEN L. JOHNSON and CHRIS KORLESKI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner had standing pursuant to Article III §2 of the United States Constitution to bring an action under 28 U.S.C. § 1331?

PARTIES TO THE PROCEEDINGS

The parties below are listed in the case caption:

US Technology Corporation;

Stephen Johnson, in his official capacity as Administrator of the Environmental Protection Agency;

Chris Korleski, Director of the Ohio Environmental Protection Agency.

CORPORATE DISCLOSURE STATEMENT

US Technology Corporation is a privately held company. It has no parent company. It issues no stock.

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OPINIONS BELOW

This action was initiated by Petitioner in the United States District Court for the Southern District of Ohio, Eastern Division. On January 28, 2008, Petitioner filed a Complaint for Declaratory Judgment and Injunctive Relief against Respondents. Respondents, United States Environmental Protection Agency ("USEPA") and the Ohio Environmental Protection Agency ("OEPA"), moved to dismiss this action in the District Court for lack of jurisdiction and for failure to state a claim upon which relief may be granted. After submittal of Petitioner's Response and Respondents' Reply, the District Court granted Respondents' motions to dismiss on January 13, 2009 and the Court's order is reprinted in Appendix, App. 2. Petitioner timely filed a Notice of Appeal on February 25, 2009 in the United States Court of Appeals for the Sixth Circuit and submitted its appellate brief on May 20, 2009 stating that the District Court erred as Petitioner did have standing to bring an action pursuant to Article III due to its injuries which were directly related to the inaction of USEPA and action of OEPA and which caused ambiguity and uncertainty of its compliance with its government contracts. Jurisdiction was proper in the matter as the Administrative Procedure Act prohibits its dismissal and the matter involves a federal question with regard to federal contracts. The Appellate Court filed its Opinion affirming the District Court's Decision on January 8, 2010, reprinted in Appendix, App. 1. This case is now

appropriately before the United States Supreme Court.

STATEMENT OF JURISDICTION

The District Court's Order granting the OEPA and USEPA's Motion to Dismiss was entered in this case on January 13, 2009. The Circuit Court affirmed the District Court's Opinion on January 8, 2010. US Technology Corporation ("UST") has timely filed its Petition for Writ for Certiorari to this Court. This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

STATUTORY AND REGULATORY PROVISIONS DISCUSSED

28 U.S.C. § 1331. Federal Question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

5 U.S.C. § 702. Right of review

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an

agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

40 C.F.R. § 266.20

(a) the regulations of this subpart apply to the recyclable materials that are applied to or placed on the land:

(1) Without mixing with any other substance(s); or

(2) After mixing or combination with any other substance(s). These materials will be referred to throughout

this subpart as "materials used in a matter that constitutes disposal."

O.A.C. § 3745-266.20

(A) Rules 3745-266-20 to 3745-266.23 of the Administrative Code apply to recyclable materials that are applied to or placed on the land:

(1) Without mixing with any other substance(s); or

(2) After mixing or combination with any other substance(s).

(3) The materials in paragraphs (A)(1) and (A)(2) of this rule will be referred to throughout the Rules 3745-266.20 to 3745-266.23 of the Administrative Code as "materials used in a manner constituting disposal."

STATEMENT OF THE CASE

On January 28, 2008, Petitioner, US Technology Corporation ("UST"), filed a Complaint seeking permanent injunctive relief and declaratory relief to insure and determine the compliance requirements of its federal military contracts. UST manufactures a masonry block for (above and below grade) residential and commercial use which contains a recycled ingredient of spent blast media. The spent blast media ingredient is a result of the military use of a plastic bead particulate ("PBP") which it leases from UST for

its military personnel to blast on the aircraft to remove its paint. The used PBP with the paint chips ("SBM") is returned to UST under a lease and recycling agreement with the federal government and the SBM is returned from the military bases and used by UST and its licensees as a beneficial ingredient in the masonry block.

The government requires that UST recycle the SBM in compliance with federal and state regulations. UST cannot obtain the assurance of compliance without an interpretation of the federal regulation 40 C.F.R. § 266.20. 40 C.F.R. § 266.20 states, in relevant part:

> (a) the regulation of this subpart apply to the recyclable materials that are applied to or placed on the land:
>
> (1) Without mixing with any other substance(s); or
>
> (3) After mixing or combination with any other substance(s). These materials will be referred to throughout this subpart as "materials used in a matter that constitutes disposal."

OEPA has determined that 40 C.F.R. § 266.20 prohibits a below grade use of the masonry block. It has only accepted the above grade masonry block as exempt from regulation as a recycled product. OEPA requires UST to obtain a hazardous waste permit to use the masonry block in below grade applications, although this would disqualify UST as a recycler and violate its federal contracts. USEPA refuses to determine

whether the block utilized in the below grade applications is disposal within the context of 40 C.F.R. § 266.20. An example of the effect on UST is as follows: OEPA opines that UST's masonry block can be used for the entire commercial construction of the building as long as the first row of block is not situated below or applied to the ground, or in the case of a residential building, the entire house can be constructed with the exception of the bottom row(s) and the basement. The practical fact that the basement block would be dampproofed and sealed thereby not actually touching any dirt is of no consequence to OEPA. This has made it impossible to bid on school and other public projects as a small portion of block for the first row was required to be supplied from a different manufacturer or if UST supplied the block then it had to manufacture this block without the recycled ingredient and color code it to distinguish it. To add further nonsense, if UST had a hazardous waste permit and met all the requirements of the permit, then it could use the block for the first row(s) and the basement. This is clearly not a health issue concern with the use of the block. It is not feasible to have a hazardous waste permit and have a recycling program with the federal government.

The District Court was empowered to grant UST's request for declaratory judgment on the application of 40 C.F.R. § 266.20 and injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure and the Circuit Court had jurisdiction over UST's appeal pursuant to 28 U.S.C. § 1292(a)(1).

The Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1) clearly provides judicial review of agency

action, that being the failure of USEPA to act, by defining its own regulations which would determine compliance with UST's federal contracts.

The District Court and the Circuit Court did not understand the issue of standing in this matter pursuant to Article III, § 2 of the United States Constitution. UST has suffered substantial and sincere injury from USEPA and OEPA which it can demonstrate is an invasion of a legally-protected interest. The states have a difference of opinion on the application and interpretation of 40 C.F.R. § 266.20. An affirmative decision that UST may utilize its product above and below grade in applications without a permit in compliance with its federal contracts would alleviate the need to have varying interpretations in the states thereby affecting the marketability of the product across state lines. In a day and age in which Leadership in Energy and Environmental Design ("LEED") products are generally praised, the varying confusion in the states has inhibited the growth of the use of the product. A determination of a violation by any state agency in regard to the compliance of UST's product with the current regulations will effectively cause termination of its federal contracts, and in reality may cause the end of an over twenty-five-year-old business.

REASONS FOR ALLOWANCE OF THE WRIT

This case depicts a real abuse of the system and demonstrates the negative effects of overreaching

regulation which stunts and prohibits the growth of small business. The decision to allow a masonry block to be used in the entire construction except the first row or two unless a hazardous waste permit is issued, could not have been the intent of 40 C.F.R. § 266.20. Various states adopt 40 C.F.R. § 266.20 in their own state counterparts such as Ohio in O.A.C. § 3745-266.20 and define the same language of the regulation in extremely different manners. UST transports the SBM between federal facilities in various states and sells the product over multiple state lines. Region IV does not restrict a recycled product containing SBM from use in a below grade application while OEPA clearly prohibits said application. The allowance and prohibition are determined by the exact same language contained in 40 C.F.R. § 266.20. This clearly provides for conflict of interpretation between the states. UST is aware that, at the very least, Mississippi, Georgia, North Carolina, South Carolina, Alabama and Florida are in conflict with Ohio. When that variation occurs within the states, no forum exists in this land to have that variation addressed for clarity. If you are the small business owner, you are simply out of luck.

In this matter, UST has requested USEPA to define 40 C.F.R. § 266.20 as it applies to a below grade application of its recycled product for years and its refusal is the same excuse it employs as a defense in this matter, that being a lack of USEPA action creates a barrier to a suit. USEPA states that it has no duty or responsibility to act or answer and its failure to do

so is not actionable. After many years, this Court is the last chance for UST to seek accountability of USEPA to define 40 C.F.R. § 266.20 and end the varying interpretation of the states.

I. UST HAS STANDING TO BRING AN ACTION PURSUANT TO ARTICLE III.

To have Article III standing, "a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Hydro Resources, Inc. v. United States Environmental Protection Agency*, 07-9506 (10th Cir. 2009); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The "injury of fact" element is clearly demonstrated in this matter in that UST has suffered "an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations, citations omitted). The varying states determination of federal regulations related to UST's product and USEPA's failure to set the interpretation that UST is able to manufacture its product for below ground usage in compliance with its government contracts is the direct subject matter of the Declaratory Judgment.

USEPA's failure to define 40 C.F.R. § 266.20 denies UST the right of determining compliance requirements with its federal contracts. This lack of a determination has subjected UST to the unnecessary expense, time and effort of many operational controls in fear of a violation or determination that it was not in compliance. UST has been prohibited from fully marketing its product capabilities. The promotion of the environmentally safe lease and recycle program with the US Government for maintenance of its military aircraft has been restricted by the lack of definitive compliance certification. OEPA has arbitrarily imposed controls on UST which have ranged from the use of colored shrink-wrap to distinguish the two above from below grade block, training, website changes and notifications, additional labeling requirements and disclosure requirements. OEPA has done random checks to insure the above controls are being performed, all of which frightens and intimidates customers and has caused cancellation of contracts and loss of contracts through a bid process due to all of the disclosure requirements. OEPA has questioned worksite employees and property owners to determine their knowledge of the product restrictions for below grade usage and OEPA has also contacted and informed other states, such as Mississippi and Georgia that it opines UST's products are restricted from below grade use. The only other alternative to the above controls, interference and costs would be to apply for and pay for a permit to become a hazardous waste facility which will in turn generate additional fees owed to the State and would result in

a termination of all federal military contracts which require a recycling exemption. This is important to note because if UST was a hazardous waste facility and paying the permit fees then it could place the product on the ground without any violation from OEPA. This clearly demonstrates a greater concern for the pocketbook of the State rather than any health analysis. In other words, to proceed with its manufacturing of its recycled masonry blocks in compliance with its federal contract, UST must expend additional costs to safeguard against a negative interpretation of 40 C.F.R. § 266.20 by states such as Ohio until such time as a determination can be held that 40 C.F.R. § 266.20 does not restrict its use of its product and that UST does not have to become a hazardous waste facility.

In a 2009 Tenth Circuit Court decision, the Court held that an out-of-pocket expense to comply with a permitting process constituted an injury-in-fact. *Hydro Resources, Inc. v. United States Environmental Protection Agency*, 07-9506 (10th Cir. 2009); citing *Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1386 (10th Cir. 1980). ("[O]ut-of-pocket cost to a business of obeying a new rule of government, or the unwanted result of the government rule whether or not [there was an associated] pecuniary loss" suffices as an "injury in fact." *Hydro* at 15; citing also *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000).

UST is required to purchase a hazardous waste permit and reclassify itself as a hazardous waste facility and lose its government contracts, not use its block below ground and lose customers and marketability, and/or create excessive and costly management controls by trying to supply both a recycled and virgin block and differentiating between the two blocks in the marketplace. This has a grave effect on sales and marketability across state lines. UST has lost customers, incurred costs to demonstrate compliance with an interpretation which has no basis in science or law and which is inconsistently applied by federal regions and states. UST clearly has an injury which entitles it to bring this action for judicial review of its compliance with its federal contracts.

II. THE APA PROHIBITS DISMISSAL OF UST'S CLAIMS.

The Administrative Procedure Act ("APA"), provides that "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." In most circumstances, "[a]n action in a court of the United States seeking relief other than money damages shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702; *see also Robbins v. United States Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006). The APA will not apply if there are other statutes which forbid the relief which is sought." *Robbins*, 438

F.3d at 1080. No other statute forbids the relief in this matter. The APA certainly provides for jurisdiction against the USEPA as this is a case in which a federal agency has caused suffering to UST and a declaratory judgment is the remedy sought. The APA is clear that an action must not be dismissed.

A review of this matter clearly demonstrates that UST has an injury that is related to a federal agency action thereby invoking the APA which permits the suit against the USEPA.

III. THE FEDERAL QUESTION CREATES ORIGINAL JURISDICTION.

This is a matter of federal question jurisdiction which creates original jurisdiction in the District Courts for all civil actions arising under the laws, constitution or treatises of the United States of America, 28 U.S.C. § 1331. The District Court opined in its Dismissal Order that UST was relying on state law which would negate the right of jurisdiction under the federal question jurisdiction, however this is simply not accurate as it is 40 C.F.R. § 266.20 which must be complied with fully in order to maintain the federal contracts and in which an interpretation must be universally applied to address the variation across the states. The Federal Government has contracted with UST, yet no definition can be provided for the varying regulations in which UST must meet for full compliance. UST's federal contract with the Department of Defense requires UST "*to*

comply with all applicable federal, state and local recycling and environmental statutes, regulations and requirements." The SBM that is returned to UST is generated at a Department of Defense owned and operated military base. UST operates in numerous states and regions. The states incorporate 40 C.F.R. § 266.20 and use federal guidance in its interpretation as the basis of their regulation. Authorized states can be more stringent in their regulations but in practice they de facto subscribe and enforce federal EPA guidelines. UST must first determine if it is in compliance with its federal contracts and federal regulations before seeking any state approval for sale of the product in that specific state. UST has maintained that USEPA must define 40 C.F.R. § 266.20 as it relates to recycled products and when "applied against the land" actually occurs to create disposal.

USEPA has sent conflicting and mixed signals to the states rather than clarifying interpretation, even when requested. This has resulted in a range of interpretation by federal regions and authorized states on whether "applied against the land" is defined as it cannot touch the land.

The federal question is whether UST is in compliance with all applicable federal recycling and environmental statutes, regulations and requirements with the manufacture of a recycled block that is used below grade. USEPA fails to definitively answer the federal question which is the relief that UST has requested through its declaratory judgment action.

IV. VARIOUS STATES DEFINE 40 C.F.R. § 266.20 DIFFERENTLY.

As previously discussed in the other sections of this Petition, the states are in conflict with one another over the interpretation of 40 C.F.R. § 266.20. The grant of this Writ will end the conflict between the states and create unity in the definition of "applied against the land" as it relates to a recycled masonry block utilized as a beneficial product in the construction of residential and commercial buildings.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
File Name: 10a0017n.06

No. 09-3224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

US TECHNOLOGY CORPORATION,

Plaintiff-Appellant,

v.

LISA P. JACKSON, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(Filed Jan. 8, 2010)

Before: MARTIN, BOGGS, and WHITE, Circuit Judges.

PER CURIAM. In this appeal, United States Technology Corporation appeals the district court's dismissal of its request for injunctive and declaratory relief. Having reviewed the briefs and records in this case, we concur with the district court's well-reasoned opinion and **AFFIRM** its judgment. *US Technology Corp., v. Stephen L. Johnson, et al.*, No. 2:08-CV-82, 2009 WL 86745 (S.D. Ohio Jan. 13, 2009).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

US TECHNOLOGY CORP.,
Plaintiff,

v.

STEPHEN L. JOHNSON, et al.,
Defendants.

Case no. 2:08-CV-82
Judge
Edmund A. Sargus, Jr.
Magistrate Judge
Norah McCann King

(Filed Jan. 13, 2009)

OPINION AND ORDER

This matter is before the Court for consideration of the Defendants' Motions to Dismiss. (Docs. 12, 14.) For the reasons stated below, the Motions are granted.

I.

Plaintiff, US Technology Corporation ("UST"), filed this action against Stephen L. Johnson, Administrator of the United States Environmental Protection Agency ("USEPA") and Chris Korleski, Director of the Ohio Environmental Protection Agency ("OEPA"), both in their official capacities, seeking a declaratory judgment and injunctive relief regarding the interpretation of Ohio Administrative Code ("O.A.C.") § 3745-266-20 and 40 C.F.R. § 266.20 as applied to UST's "SEALTECH block."

UST manufactures SEALTECH block by recycling spent blast media ("SBM"), which includes residue-plastic particles and paint chips. (Compl. ¶ 2.) The process begins when a user, such as the United States Department of Defense, applies plastic blast media ("PBM") against a metal to remove paint. (Compl. ¶ 1-3.) Because the byproduct contains heavy metals from the old paint, including lead, chromium, and cadmium, SBM is initially categorized as hazardous waste. (Compl. ¶ 2.) Making good use of an otherwise hazardous product, UST procures waste SBM and utilizes it in a patented process to manufacture its SEALTECH masonry block. (Compl. ¶ 6.)

When SEALTECH blocks are used in an approved manner, the recycled SBM ingredient is no longer considered hazardous waste. (Compl. ¶¶ 5-6.). *See* O.A.C. § 3754-51-02(E)(1) (stating that materials are not waste when recycled as specified). OEPA has determined, however, that this recycling exception ceases when SEALTECH blocks, including their SBM contents, are "applied to or placed on the land." O.A.C. § 3745-266-20(A). At that point, OEPA no longer considers SEALTECH blocks benign recycled waste but classifies them as being "used in a manner that constitutes disposal." Characterizing SEALTECH blocks that are applied or placed on the land as "disposal" subjects UST to the more onerous requirements of O.A.C. §§ 3745-266-20-23.[1] Use of materials

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[1] O.A.C. § 3745-266-22; O.R.C. § 3734.02. In relevant part, O.A.C. § 3745-266-20 provides:

(Continued on following page)

in a manner constituting disposal requires, among other things, the acquisition of hazardous waste permits for the storage of the materials.

In June 2004, the Director of OEPA issued a set of Findings and Orders formally approving UST's recycled use of SBM in the manufacture of split-faced masonry block (*i.e.*, SEALTECH block), if managed "in accordance with OAC rules 3754-51-01 and 51-02."[2] (Doc. 14-3 ¶ 3.) In part, the OEPA Findings and

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(A) Rules 3745-266-20 to 3745-266-23 of the Administrative Code apply to recyclable materials that are applied to or placed on the land:

(1) Without mixing with any other substance(s); or

(2) After mixing or combination with any other substance(s).

(3) The materials in paragraphs (A)(1) and (A)(2) of this rule will be referred to throughout rules 3745-266-20 to 3745-266-23 of the Administrative Code as "materials used in a manner that constitutes disposal."

See also O.A.C. § 3754-51-02(c) ("Materials are wastes if they are recycled . . . in a manner constituting disposal . . . [when] applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land[.]"); O.A.C. § 3754-51-02(E)(2) ("[M]aterials are wastes, even if [recycled] . . . (a) . . . [when] used in a manner constituting disposal, or used to produce products that are applied to the land[.]").

[2] In its June 17, 2004 letter, OEPA cited O.A.C. § 3745-51-01 and 51-02, not O.A.C. § 3745-266-20. (Doc. 14-3 ¶¶ 3, 18.) To clarify, O.A.C. § 3745-266-20, the portion of the Administrative Code cited most frequently by UST, begins and outlines the section of regulations applicable to "materials used in a manner that constitutes disposal." Various other code portions, including

(Continued on following page)

Orders required UST to submit monthly reports regarding the manufacture and sale of SEALTECH block. (Doc. 14-3 "ORDERS" ¶ 1.) As follow-up to one or more of these reports, inspectors from OEPA visited various construction sites utilizing SEALTECH blocks and found that the product had been used below grade. (Doc. 14-43.) Through a series of letters (not formal Findings or Orders), OEPA informed UST that SEALTECH blocks used below grade, such as in building foundations, are waste materials "used in a manner constituting disposal." (*See* Doc. 14-44.) OEPA suggested an abatement strategy in response to UST's alleged violations, where UST would implement various management controls to "insure [sic] that the Scaltech block is not used in the below grade applications."[3] (Compl. ¶¶ 24-25.) This strategy called for improvements in packing labels, direct sales, distributor training, and product literature to avoid future below grade use. (Doc. 14-43-4.) Regardless of the proposals suggested, OEPA maintained a stance that SEALTECH blocks could not be used below

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O.A.C. § 3745-51-01 and 51-02, define recycled waste materials and indicate when they are considered used "in a manner constituting disposal," making them subject to the more demanding requirements of O.A.C. § 3745-266-20 to 266-23.

[3] The facts as presented in the Complaint and memoranda are not entirely clear on this issue. Presumably, instead of imposing fines or implementing the more stringent restrictions of O.A.C. § 3745-266-20 to 266-23, OEPA proposed an abatement strategy outlined in several letters. These facts, however, are tangential and not necessarily relevant for purposes of the Opinion here.

grade or they would be considered waste "used in a manner that constitutes disposal."

OEPA's determination based on O.A.C. § 3745-266-20 and other portions of the Ohio Administrative Code restricts the use of SEALTECH block to above-grade application and prohibits its use in basements or foundations. UST challenged OEPA's suggested management controls and claimed that "a proper forum did not exist for UST to demonstrate that it had not violated Ohio Revised Code sections" in an initial appeal to Ohio's Environmental Review Appeals Commission ("ERAC"). (Compl. ¶ 26.) ERAC dismissed the appeal, stating that the proposed management controls, as set forth in the series of letters, were not a "final action" of the OEPA Director and that UST was free to disregard the suggested means of compliance. (Compl. ¶ 27.) A subsequent opinion of Ohio's Tenth Appellate District Court of Appeals affirmed ERAC's judgment. (Doc. 14-6 ¶ 17.)

UST now alleges that OEPA's prohibition against below-grade application of SEALTECH block misapplies Ohio regulations and follows from an "an [improper] interpretation of federal regulations" (Compl. ¶¶ 38, 61-62). According to UST, the Ohio administrative regulations originate from the same source: the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* RCRA authorizes the USEPA Administrator to coordinate with the states for implementation of their own hazardous waste programs. 42 U.S.C. § 6926(b). Thus, USEPA formulated federal regulations pursuant to RCRA,

and OEPA formulated similar regulations for the State of Ohio. As such, the "use constituting disposal" and "applied to or placed on land" language in the Ohio Administrative Code closely mirrors the language found in the Code of Federal Regulations.[4] As for this litigation, however, only OEPA, and not USEPA, has initiated RCRA enforcement actions against UST.

UST attributes only a few actions (or non-actions) to USEPA for which it seeks a remedy. These include: (1) USEPA's authorization of Ohio's RCRA plan, a plan used for enforcement by OEPA against UST (Compl. ¶ 44.), and (2) USEPA's failure to reach a determination on whether SEALTECH block utilized below grade is "applied to the land" in a manner constituting hazardous waste disposal.[5]

---

[4] 40 C.F.R. § 266.20 states, in relevant part:

> (a) The regulations of this subpart apply to recyclable materials that are applied to or placed on the land:
>
> (1) Without mixing with any other substance(s); or
>
> (2) After mixing or combination with any other substance(s). These materials will be referred to throughout this subpart as "materials used in a manner that constitutes disposal."

[5] *See also* Pl.'s Mem. Opp. USEPA's Mot. to Dismiss 5 ("Either USEPA has precluded UST from utilizing its product below grade [presumably by OEPA application of 40 C.F.R. § 266.20 or the analogous O.A.C. § 3745-266-20] or USEPA has failed to act to establish that its standard does not preclude the use of the product.")

UST's allegations against OEPA are more robust. Primarily, it argues that OEPA has improperly found that below-grade applications of SEALTECH block constitutes disposal of hazardous waste under O.A.C. § 3745-266-20 and 40 C.F.R. § 266.20. UST's discussion of OEPA actions throughout the Complaint can be summarized as follows: (1) OEPA claims that its Ohio Administrative Code standard is equivalent to that set forth in the Code of Federal Regulations, not more stringent; (2) OEPA has admitted that it interprets the regulatory concept of "use constituting disposal" differently than other states; (3) OEPA has intentionally restricted and harmed UST's business in Ohio through its regulatory enforcement; (4) OEPA's determination regarding SEALTECH block is inconsistent with the regulation of other manufacturers, putting it at a competitive disadvantage; (5) OEPA's regulatory findings against SEALTECH block have less to do with safety and more to do with an erroneous interpretation of federal regulations; (6) OEPA incorrectly finds SEALTECH block used below grade to be in contact with the land, when certain procedures prevent actual contact with earth; and (7) "OEPA has determined to hide behind the cloak of the USEPA as it cites that it is consistent with the USEPA in its determination" (Compl. ¶ 63).

All of these allegations return to the same request for relief: "[a] declaratory judgment on whether below grade use of Sealtech block is 'applied to the land' within the meaning of 40 C.F.R. § 266.20 and O.A.C. [§] 3745-266-20 . . . " (Compl. ¶ 58.) Thus, in

this action, UST seeks a declaratory judgment that OEPA's interpretation of O.A.C. § 3745-266-20 and 40 C.F.R. § 266.20 is improper. Correspondingly, UST seeks an injunction against OEPA Director Korleski directing him to implement an interpretation that use of SEALTECH block below grade is not disposal and does not require application of the O.A.C. §§ 3745-266-20 through 23.

II.

Defendants USEPA and OEPA contend that dismissal is appropriate under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) for "failure to state a claim upon which relief can be granted."

To overcome a 12(b)(1) motion to dismiss, the plaintiff bears the burden of establishing the Court's subject matter jurisdiction. *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction fall into two categories: facial attacks and factual attacks. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). In a facial attack, the defendant challenges the pleading itself, claiming the plaintiff has not alleged facts sufficient to establish subject matter jurisdiction. *Muskingum Coll.*, 318 F.3d at 677. The Court must take all material allegations in the complaint as true, and construe them in the light most favorable to the

nonmoving party. *Ritchie,* 15 F.3d at 598. A factual attack is a challenge to the "factual existence of subject matter jurisdiction." *Id.* In considering such a motion, "the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits." *Muskingum Coll.,* 318 F.3d at 677. Examination of such materials, however, does not convert the 12(b)(1) motion to a Rule 56 summary judgment motion. *Rogers v. Stratton Indus.,* 798 F.2d 913, 916 (6th Cir.1986)

Rule 12(b)(6) allows the Defendant to raise, by motion, the defense of "failure to state a claim upon which relief can be granted." In considering a motion under the rule, the Court is to construe the complaint in the light most favorable to the Plaintiff, accepting all well-pleaded factual allegations as true. *Kottmyer v. Maas,* 436 F.3d 684, 688 (6th Cir. 2006). Although a motion under Rule 12(b)(6) is reviewed with a liberal standard, a pleader must set forth more than bare assertions of legal conclusions. *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir. 2007) ("*LULAC*") (citing *Bovee v. Coopers & Lybrand CPA,* 272 F.3d 356, 361 (6th Cir. 2001)). As the Supreme Court recently explained, the Plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true. . . ." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, ___, 127 S.Ct. 1955, 1965 (2007) (internal citations omitted). "To state a valid claim, a complaint

must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *LULAC,* 500 F.3d at 527 (citing *Twombly,* 127 S.Ct. at 1969).

Here, USEPA and OEPA move for dismissal under both Rule 12(b)(1) and 12(b)(6). Where both rules are invoked, the 12(b)(1) motion should be considered first because the 12(b)(6) "challenge becomes moot if [the] court lacks subject matter jurisdiction." *Moir,* 895 F.2d at 269.

III.

Both USEPA and OEPA assert that the Court lacks subject matter jurisdiction under various theories. At the outset, the Court finds that the Defendants' motions to dismiss present facial attacks on the subject matter jurisdiction of this Court.[6] As

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[6] The Court notes that Defendant OEPA submitted several documents in support of its Motion. These include the following: (1) OEPA's June 17, 2004 "Director's Final Findings and Orders" regarding UST (Doc. 14-3); (2) a September 11, 2006 Letter from OEPA to UST's counsel, Ms. Laura L. Mills (Doc. 14-4); (3) an April 11, 2007 Ruling and Final Order by the State of Ohio Environmental Review Appeals Commission, with UST as a party (Doc. 14-5); and (4) a November 15, 2007 opinion by Ohio's Tenth Appellate District Court of Appeals, with UST as a party (Doc. 14-6). Each of these documents is either a public record or referred to in Plaintiff's Complaint. As for matters of public record, the Court may take these documents into account on this Motion to Dismiss without converting it to one for summary judgment by considering matters outside the pleadings. *Amini v. Oberlin College,* 259 F.3d 493, 502 (6th Cir. 2001) ("'In

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such, in ruling upon the Motions, the Court will consider the material allegations in UST's complaint as true, and will construe the facts in the light most favorable to Plaintiff-UST. Because the Court reaches the conclusion that dismissal is warranted for both USEPA and OEPA for lack of subject matter jurisdiction, it will not address Defendants' alternative bases for dismissal or stay.

A. USEPA's Motion to Dismiss[7]

In support of its jurisdictional argument, USEPA asserts that Article III of the United States Constitution precludes jurisdiction here for lack of a case or controversy between it and UST. UST counters that the Court has federal question jurisdiction under

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determining whether to grant a 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.'" (quoting *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir. 1997))); *see also* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990). Similarly, documents may be considered part of the pleadings, "if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999).

[7] Because UST filed its Complaint against the USEPA Administrator in his official capacity, the suit is considered as against the Agency. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").

28 U.S.C. § 1331. The Court agrees that, because UST does not establish the necessary elements for a case or controversy, UST lacks jurisdictional standing. Moreover, the Court concludes that the statutes UST cites are not sufficient to invoke the Court's federal question jurisdiction, if in fact the pleadings do not disclose an actual controversy.

1. Cases and Controversies Jurisdiction Under Article III

Article III, § 2 of the United States Constitution limits the jurisdiction of federal courts to "cases" and "controversies" between parties. In each federal case, therefore, the plaintiff must establish that an actual case or controversy exists to support jurisdiction. *Lujan, v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). In order to satisfy this Article III requirement here, Plaintiff-UST must show that it suffered an "injury in fact," which it can demonstrate by presenting an "invasion of a legally protected interest" that is both "concrete and particularized" and "actual and imminent." *Id.* Plaintiff must also demonstrate a causal connection between the injury and the conduct complained of, and that a favorable decision would likely redress or remedy the injury. *Id.*

In support of its position that a case or controversy exists between it and USEPA, UST contends that it suffered an injury in fact because USEPA took *action* against its [sic] by implementing the federal regulations contained in 40 C.F.R. § 266.20 under

RCRA. (Compl. ¶¶ 44-47.) Although its theory is not clear, UST seeks to satisfy its case or controversy requirement between itself and USEPA by contending that OEPA utilizes USEPA's regulation to justify an improper application against it. Therefore, according to UST, USEPA itself is indirectly prohibiting SEALTECH block's use below grade. (Pl.'s Mem. Opp. USEPA's Mot. to Dismiss at 5). Alternatively, UST maintains that USEPA *inaction* has harmed it because the federal agency has failed to definitively find that 40 C.F.R. § 266.20 does not preclude the use of SEALTECH block below grade. (Compl. ¶ 64; Pl.'s Mem. Opp. USEPA's Mot. to Dismiss at 5.) Neither of these arguments related to USEPA's purported *action* or *inaction* survives scrutiny.

a. Direct and Indirect Action by USEPA

UST cannot establish agency *action* by USEPA, direct or indirect, sufficient to meet the case and controversy requirement. UST does not allege direct action, such as an enforcement effort or similar activity by USEPA against UST. Although UST alleges that OEPA for its [sic] has misinterpreted Ohio and federal law, its Complaint is devoid of any factual content related to USEPA action. Indeed, UST states in its Complaint that "[t]his case presents an actual controversy *between UST and the OEPA*" (Compl. ¶ 56 (emphasis added).) Notably, UST does not allege a controversy with USEPA, and the remainder of the pleading likewise confirms that USEPA has engaged

in no direct actions against UST sufficient to meet the case and controversy requirement.

UST contends that USEPA engaged in indirect action that caused injury through its promulgation of 40 C.F.R. § 266.20 under RCRA (similarly implemented by OEPA as O.A.C. § 3745-266-20). According to UST, OEPA justifies its enforcement actions in this case based on an interpretation of O.A.C. § 3745-266-20 and 40 C.F.R. § 266.20. The Court interprets UST's argument to mean that USEPA indirectly prohibits UST from using SEALTECH block below grade. More precisely, UST appears to contend that USEPA promulgates minimum standards for RCRA's implementation by the states, and therefore, the states are merely proxies of the federal government when implementing relevant state codes. An analysis of the administrative regimes reveals, however, that state and the federal governments enforce their RCRA regimes independently, thus undercutting UST's contention that the states are merely proxies for the USEPA.

USEPA promulgated 40 C.F.R. § 266.20 pursuant to RCRA, 42 U.S.C. § 6901 *et seq.*. RCRA provides a comprehensive framework for governing hazardous wastes to "minimize the present and future threat to human health and the environment," 42 U.S.C. § 6902(b). In pursuit of this goal, RCRA authorizes the USEPA Administrator to coordinate with the states for implementation of their own hazardous waste programs "in lieu of the Federal program." 42 U.S.C. § 6926(b). RCRA permits states to enforce

requirements more stringent than those proposed by USEPA, but such regulations may not be less restrictive than those imposed by the federal government. 42 U.S.C. § 6929. Accordingly, USEPA authorized the State of Ohio to administer its statewide-hazardous waste program on June 30, 1989, making OEPA Ohio's formal arbiter of RCRA enforcement. *United States v. WCI Steel, Inc.*, 72 F. Supp. 2d 810, 818 (N.D. Ohio 1999). As part of this authorization, USEPA specifically approved of O.A.C. § 3745-266-20 with its "use constituting disposal" and "applied to or placed on land" language similar to that in the Code of Federal Regulations.[8] *See* 40 C.F.R. § 272.1801 (2008) (incorporating Ohio regulations by reference).

The text of RCRA, however, does not support UST's position that state enforcement actions under RCRA, specifically O.A.C. § 3745-266-20, necessarily implicate USEPA or federal government action. The plain language of RCRA indicates that state implementation operates "*in lieu of* the Federal program." 42 U.S.C. § 6926(b) (emphasis added). Later construction of RCRA further confirms the plain meaning of the text. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 611 (1992) ("RCRA regulates the disposal of hazardous waste . . . with a permit program run by EPA but

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[8] USEPA originally approved of O.A.C. § 3745-58-30 in 40 C.F.R. § 272.1801(a)(1). O.A.C. § 3745-58-30 was later renumbered as O.A.C. § 3745-266-20, the regulation for which UST now seeks the Court's interpretation. *See* O.A.C. § 3745-266-20 ("HISTORY: Replaces former rule 3745-58-30.").

subject to displacement by an adequate state counterpart."); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 979 (S.D. Ohio 1993) ("Ohio's hazardous waste management program was authorized to operate in lieu of the federal program.").

While the language of O.A.C. § 3745-266-20 and 40 C.F.R. § 266.20 are similar in text, they are not equivalent in operation. OEPA promulgates and enforces RCRA provisions in the Ohio Administrative Code under its grant of authority from the Ohio General Assembly, and USEPA promulgates and enforces similar federal regulations as empowered by Congress. USEPA initially approved of Ohio's RCRA enforcement program in June 1989, *WCI Steel, Inc.*, 72 F. Supp. 2d at 818. OEPA, however, does not enforce federal law; nor does USEPA enforce state law. USEPA simply ensures that the OEPA program continues to meet minimum standards, enforceable through various monitoring tools. 42 U.S.C. § 6926. USEPA retains the authority to enforce the federal regulations despite the existence of similar state regulations, but it must first provide advance notice of such actions to the authorized state. 42 U.S.C. § 6928(a)(2). Relating to UST's SEALTECH block, USEPA has provided no such notice to the State of Ohio nor has it pursued any enforcement actions against UST without such notice.

In *City of Heath v. Ashland Oil, Inc.*, this Court found that "a citizen suit is not available in an authorized state for an alleged violation of a federal provision superseded by state law pursuant to 42

U.S.C. § 6926(b)." 834 F. Supp. 971, 979 (S.D. Ohio 1993). Where the state has superseded the federal law with its own law under RCRA authorization, actions alleging violations of these state laws "should be brought in state court under state law." *See id.* at 978 (citing *Thompson v. Thomas,* 680 F. Supp. 1, 3 (D.D.C. 1987)); *see also Dist. of Columbia v. Schramm,* 631 F.2d 854, 861 (D.C. Cir. 1980) (finding an EPA decision not to veto a state's issuance of a permit under the Clean Water Act was not actionable because "[g]ranting federal court review of the [EPA]'s actions . . . would upset the federal-state balance struck by Congress: it would allow parties to create a basis for federal jurisdiction when federal involvement is merely secondary"). As determined in *City of Heath,* and based on the plain language of RCRA, USEPA's authorization of Ohio's state-administered RCRA program does not implicate federal action merely because the state enforces its similar state regulations. OEPA's actions against UST, therefore, are not equivalent to USEPA action.

b. Inaction by USEPA

UST contends that USEPA's inaction, in particular its failure to define whether SEALTECH block is appropriate for use below grade, creates a cognizable case and controversy in this Court. This contention is similarly unavailing.

UST cites no authority for the proposition that a federal administrative agency's failure to promulgate

a particular regulation somehow generates federal jurisdiction. UST's Complaint makes passing reference the Administrative Procedures Act ("APA"), which authorizes reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under the Supreme Court's narrow construction of § 706(1) of the APA, however, a claim "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004) (emphasis added). Here, UST provides no source identifying USEPA's obligation to take action; UST merely asserts, without more, that "USEPA has failed to act to establish its standard does not preclude the use of the product." (Pl.'s Mem. Opp. USEPA's Mot. to Dismiss at 5.) The APA does not assist UST in its attempt to establish standing.

Similarly, RCRA provides no bases from which UST may derive standing to sue. The relevant RCRA citizen-suit language permits commencement of civil action "against the [USEPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is *not discretionary* with the Administrator." 42 U.S.C. § 6972(a)(2) (emphasis added).[9] Again, UST fails to

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[9] RCRA contains two other vehicles for citizen-suits in 42 U.S.C. § 6972, neither of which is applicable here. The first, under subsection (a)(1)(A) permits suits, within the constraints of the Eleventh Amendment of the Constitution, against the

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identify a non-discretionary requirement under RCRA that compels USEPA to define the "applied to the land" language of 40 C.F.R. § 266.20 as pertaining to the use of SEALTECH block below grade. Further, and as discussed above, OEPA is authorized to control Ohio's RCRA program, including O.A.C. § 3745-266-20; USEPA is under no obligation to make a determination regarding 40 C.F.R. § 266.20 and SEALTECH block. *See* 42 U.S.C. § 6926(b) (describing USEPA authorized state law as operating "in lieu of" federal law). Even if OEPA's interpretation of O.A.C. § 3745-266-20 or, as UST sometimes contends, 40 C.F.R. § 266.20, is more restrictive than USEPA's interpretation of its regulation, RCRA expressly permits states to adopt more rigid enforcement regimes. 42 U.S.C. § 6929.[10] The Court concludes that UST has

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United States and others for alleged violations of "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." The second, at subsection (a)(1)(A), permits suits against the United States and other parties for contributing "to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Both of these vehicles require advance notice to the USEPA Administrator prior to the commencement of a civil action. 42 U.S.C. § 6972(c). Plaintiff does not contend, and the record does not support a finding that such advance notice was provided here.

[10] Even if UST had demonstrated that USEPA failed to perform a non-discretionary action, it failed to comply with the RCRA requirement to provide notice to USEPA before a civil suit. 42 U.S.C. § 6972(c) (requiring no action to be pursued "prior to sixty days after the plaintiff has given notice to the [USEPA] Administrator that he will commence such action").

not established the USEPA's alleged inaction caused an injury in fact sufficient to assert that an actual case or controversy exists here to support standing.

2. Arising Under Jurisdiction

UST asserts that the Court has subject matter jurisdiction under 28 U.S.C. § 1331. ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). UST has done no more than reference this statute in its attempt to invoke this Court's limited federal question jurisdiction. The Supreme Court has read "the phrase 'arising under' federal law," as found in 28 U.S.C. § 1331, "to exclude cases in which the plaintiff relies on state law, even when the state's exercise of power in the particular circumstances is expressly permitted by federal law." *U.S. Dep't. of Energy v. Ohio,* 503 U.S. 607, 625-26 (1992). *See also* U.S. Const. art. III, § 2 (limiting judicial power to cases "arising under . . . the Laws of the United States"). As set forth above, the state and federal RCRA regulations, while complementary, operate independently. UST's mere mention of 40 C.F.R. § 266.20 as a source of its grievances does not require the conclusion that its claim necessarily arises under federal law.

Here, despite several references to federal regulations, UST's claims, at bottom, rely on state law, not federal law. Under the facts, only OEPA has utilized its RCRA-based regulations against UST. Without a

factual predicate, UST's incantation of 28 U.S.C. § 1331 alone does not create a basis for "arising under" jurisdiction.

Similarly, UST's mere reference to the Tucker Act, 28 U.S.C. § 1346, is unavailing. The statute provides that "district courts shall have original jurisdiction" over "civil action[s] or claim[s] against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. 28 U.S.C. § 1346(a). Here, UST fails to meet the requirement that the "claim must be one for money damages against the United States." *United States, v. Mitchell,* 463 U.S. 206, 216 (1983) (internal citations omitted); *A.E. Finley & Assocs., Inc. v. United States,* 898 F.2d 1165, 1167 (6th Cir. 1990). UST does not seek monetary damages, but instead solely requests injunctive relief.

Finally, UST's invocation of the Declaratory Judgment Act does not meet the requirements for arising under jurisdiction. The Declaratory Judgment Act only applies to cases of "actual controversy." 28 U.S.C. § 2201(a). This Act "does not provide an independent basis for jurisdiction," but only provides opportunity for remedy "where federal jurisdiction already exists." *One Beacon Ins. Co. v. Chiusolo,* No. 07-5855, 2008 WL 4463786, at *3 (6th Cir. Oct. 2, 2008) (citing *Heydon v. MediaOne of Se. Mich., Inc.,* 327 F.3d 466, 470 (6th Cir. 2003)). For the many reasons discussed above, an actual case or controversy with USEPA does not exist here. Thus, the

Declaratory Judgment Act does not apply and cannot support an independent ground for federal jurisdiction.

UST's references to these various federal statutes is insufficient to establish federal question jurisdiction as none arises under federal law. UST has failed to demonstrate subject matter jurisdiction as against USEPA under any theory. USEPA's Motion to Dismiss is, accordingly, **GRANTED**.

B. OEPA's Motion to Dismiss

OEPA presents several theories in its attempt to demonstrate that the Court lacks jurisdiction. OEPA contends, among other arguments, that the state agency and its Director are immune under the Eleventh Amendment and the *Ex parte Young* doctrine, 209 U.S. 123 (1908). Additionally, OEPA submits that its actions against UST are not final; that the Court should decline jurisdiction under the abstention doctrine; and that other equitable considerations merit granting of its motion. The Court agrees that it does not have jurisdiction over the claims raised by UST against OEPA because these claims arise under state not federal law. Consequently, the Court need not address the other legal theories presented by OEPA.

As with the analysis regarding subject matter jurisdiction over UST's claims against USEPA, the Court, in all cases, requires federal question or

arising under jurisdiction for claims against OEPA.[11] 28 U.S.C. § 1331; *see also Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 554 (6th Cir. 2005) ("Any notion that the jurisdictional net should be broadly cast by the courts is at odds with the constitutional establishment of a federal government of limited powers."). Claims invoking federal question jurisdiction under 28 U.S.C. § 1331 "may be dismissed for want of subject-matter jurisdiction if it is not colorable, i.e., if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 n.10 (2006) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). Even if the parties do not raise the issue, courts "have an independent obligation to determine whether subject-matter jurisdiction exists." *Arbaugh*, 546 U.S. at 514.

UST's reliance on 28 U.S.C. § 1331 is insufficient here because no colorable claim of federal law remains. First, as discussed above, OEPA's authorized RCRA enforcement does not involve a federal question because its program operates in lieu of federal law.[12] While UST may claim that OEPA hides "behind

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[11] Other sources of jurisdiction, such as diversity of citizenship, amount in controversy or other specific grants of federal question jurisdiction are not applicable to the facts presented here.

[12] *See U.S. Dep't. of Energy*, 503 U.S. at 625-26 (excluding cases under 28 U.S.C. § 1331 where the "plaintiff relies on state law, even when the state's exercise of power in the particular circumstances is expressly permitted by federal law"); *City of*

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a cloak" of federal law or incorrectly interprets federal regulations, OEPA merely has the authority to interpret and implement the laws of the State of Ohio.

Therefore, UST can only hold OEPA accountable for application of O.A.C. § 3745-266-20 or other sections of the Ohio Revised or Administrative Code, not its alleged application of 40 C.F.R. § 266.20 or other sections of the United States Code or Code of Federal Regulations. By themselves, questions regarding these state regulations are merely issues of state law. *See Dague,* 732 F. Supp. at 465 (noting that challenges to a RCRA action in an authorized state may be brought under state not federal law); *Schramm,* 631 F.2d at 863 (finding under the Clean Water Act that "state courts are the proper forums for resolving questions about [the issuance of state] permits, which are, after all, questions of state law"). These questions must be resolved in state courts. *See,*

Heath, 834 F. Supp. at 979 (finding that a "citizen suit is not available in an authorized state for an alleged violation of a federal provision superseded by state law" and stating that "there is a clear position among several courts that [a] RCRA citizen suit is not available to enforce a state authorized program"); *Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army,* 990 F. Supp. 1316, 1319 (D. Utah 1997) (holding that once USEPA authorized the State of Utah to administer RCRA, "the federal statute was no longer applicable," permitting suit only under state law); *Dague v. City of Burlington,* 732 F. Supp. 458, 465 (D. Vt. 1989) ("[A] plaintiff seeking to challenge the operation of a hazardous waste site in an EPA authorized state may bring an action under state law, not federal law.").

e.g., Barton v. Summers, 293 F.3d 944, 948 (6th Cir. 2002) (noting that, without consent, states and state agencies are generally immune from private suit in federal courts under the Eleventh Amendment.)[13]

UST also mentions several other federal statutes in an attempt to invoke 28 U.S.C. § 1331 arising under jurisdiction, but none of these apply to OEPA or the State of Ohio. The APA, in particular, does not apply to states and therefore cannot provide a source of federal question jurisdiction against OEPA. *Sw. Williamson County Cmty. Ass'n, Inc. v. Slater,* 173 F.3d 1033, 1035 (6th Cir. 1999) ("By its own terms, the APA does not apply to state agencies."). Similarly, other federal statutes referenced by UST, including 28 U.S.C. § 1346 (the "United States as a Defendant") and 28 U.S.C. § 2412 ("Costs and fees"), only apply against the United States as a defendant. Finally, UST cites 28 U.S.C. § 2201 ("Creation of a remedy") and 28 U.S.C. § 2202 ("Further relief") which require actual controversy within the court's jurisdiction. Because this Court lacks jurisdiction initially, these statutes cannot, post hoc, provide a basis for federal

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[13] An exception to this rule is one not at issue here. Under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), the Eleventh Amendment does not bar a federal court from issuing an injunction ordering prospective relief against a state official in order to prevent future constitutional violations. *Id.* at 159-60. Although Plaintiff seeks injunctive relief against a state official, UST does not plead, nor do the facts support, that OEPA is engaging in unconstitutional conduct which this Court could prevent from continuing.

question jurisdiction. *Stanley v. Avery,* 387 F.2d 637, 638 (6th Cir. 1968) ("The Declaratory Judgment Act enlarged the range of remedies in the federal courts but did not alter or extend their jurisdiction.") (citing *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950)).

IV.

For the foregoing reasons, Defendants' Motions to Dismiss (Docs. 12, 14) are **GRANTED.** This action is **DISMISSED.**

IT IS SO ORDERED.

/s/ [Illegible]
EDMUND A. SARGUS, JR.
UNITED STATES
DISTRICT JUDGE

DATED: 1-13-2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Eastern Division

US TECHNOLOGY CORP., **Plaintiff,** **vs.** **STEPHEN L. JOHNSON, et al.,** **Defendants.**	**JUDGMENT IN A CIVIL CASE** (Filed Jan. 13, 2009) **CASE NO. C2-08-82 JUDGE EDMUND A. SARGUS, JR. MAGISTRATE JUDGE NORAH MCCANN KING**

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** A decision has been rendered by the Court without a hearing or trial.

Pursuant to the OPINION AND ORDER filed January 13, 2009, JUDGMENT is hereby entered DISMISSING this action.

Date:
January 13, 2009

JAMES BONINI, CLERK

/s/ Andy F. Quisumbing
(By) Andy F. Quisumbing
Courtroom Deputy Clerk